

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 99-76

November 17, 1999

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Operational Changes and Direction in FOIA Practices Regarding
Discretionary Disclosure and Confidentiality Assurances for Reluctant
Witnesses

On September 17, 1999, the GC approved the FOIA Manual and Appendices. On November 16, 1999, the Manual was distributed to the Regions and Headquarters. The Manual and its Appendices are being distributed in loose-leaf form to simplify change. On or about November 22, 1999, the four sections of the Manual, the Substantive Portion and its Appendix and the Procedural Portion and its Appendix, will also be available on each Regional Office file server (Y:\public\FOIA\ for searching and copying. There will be four separate Microsoft Word documents in "read only" format.¹ The General Counsel has decided not to withhold the FOIA Manual as an internal document. However, in the event of a request for the FOIA Manual by a member of the public, please contact the Headquarters FOIA Officer prior to disclosure.

Further, as explained in the cover memorandum accompanying distribution of the Manual, the Manual, with a few exceptions, is a compilation of existing FOIA practice. Two of the exceptions -- dealing with discretionary disclosure and confidentiality assurances -- are addressed herein.

1. The Manual provides for discretionary disclosure of exempt information where the release will not cause any foreseeable harm. This is at variance with current Regional practice. Except for certain limited categories set forth in the Manual, Headquarters will initially control the disposition of such disclosure. (See Procedural Portion, pp. 38-45). After a period of six months, representatives of Operations, Enforcement and Advice, in consultation with Field managers, will review the particular issue and decide if Headquarters' role should be maintained or if the Regions will be allowed to make the determination as to specific documents without checking first with Headquarters.

¹ We are exploring the use of a computer program (in Excel or Access) comparable to the one created by Region 14 to track FOIA requests and generate year-end reports. Additionally, in the future, we anticipate training in the use of CATS to assist searching for responses to FOIA requests.

2. The Manual changes current Board agent practice regarding confidentiality assurances. That is, in order to bolster the effectiveness of the confidentiality assurances in Board-Agent affidavits, the Manual provides (Procedural Portion, pp. 46-47; Substantive Portion, pp. 61-62), that where witnesses are reluctant to provide affidavits, Board agents will document those concerns and any oral assurances of confidentiality specifically given.

Exemption 7(D) protects against disclosure of information that could disclose the identity of confidential sources. Currently the affidavits used by Board agents contain a boilerplate statement promising confidentiality unless the affidavit has to be produced in connection with a formal proceeding.² However, the effectiveness of boilerplate assurances of confidentiality in claiming protection under Exemption 7(D) is questionable in light of the holding in U.S. Dep't of Justice v. Landano, 508 U.S. 165, 181 (1993) and its progeny. In Landano, the Court held that "... the question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential."³ In light of Landano, confidentiality of sources ordinarily is not presumed, but must be proven by the agency on a case-by-case basis.

It is rare that a Board agent will encounter a witness who refuses to give evidence without an assurance of confidentiality beyond the boilerplate.⁴ However, if a Board agent is faced with a reluctant witness who expresses concerns about the confidentiality of his

² See Form NLRB-5168 (3/90) Affidavit ("I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed unless it becomes necessary for the government to produce the affidavit in connection with a formal proceeding.")

³ See also, Computer Professionals for Social Responsibility v. U.S. Secret Service, 72 F.3d 897, 906 (D.C. Cir. 1996) citing to Landano (while "certain circumstances characteristically support an inference of confidentiality"... the manner in which an agency 'routinely' handles information is not sufficient to establish an implied assurance of confidentiality as to any particular source."); Quinon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (requiring FBI on remand to support inference of assurance of confidentiality with additional affidavits establishing informants' particular relationships with subjects of investigation and nature of information provided by them); Ortiz v. HHS, 70 F.3d 729, 734-35 (2d Cir. 1995), cert. denied 116 S. Ct. 1422 (1996) (court found implied assurance of confidentiality where evidence cumulatively established seriousness of informant's allegation against subject of investigation, informant's close relationship to subject of investigation, possibility of retaliation against informant, and anonymity of informant).

⁴ In addition, it is rare that the 7(D) exemption is essential to protect the identity of the informant. This is because this type of information usually can be safeguarded under FOIA Exemption 7(C).

statement, in order to meet the Landano standard, Board agents should make *and document* any specific individual assurance of confidentiality.⁵ That is, the Board agent should create a statement in the form of a dated memorandum to the file. This statement should include a declaration that, in accordance with the agency's consistent policy of offering such assurances to reluctant witnesses, the agent has extended an express grant of confidentiality to the witness because of the witness' refusal to otherwise provide the information. The declaration should state exactly what assurances were given. Further, in this statement, the witness' reluctance to give an affidavit must also be documented. That is, the agent should describe in detail the serious nature of the unfair labor practice allegations, the informant's close relationship to and/or involvement with the alleged wrongdoing or wrongdoer, and the potential that the source might face retaliation, reprisal or harassment were his/her identity disclosed.

If you have any questions concerning this memorandum, please contact Margery E. Lieber, Assistant General Counsel for Special Litigation or Abby Propis Simms, Supervisory Attorney, Special Litigation Branch.

R.A.S.

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⁵ See Davin v. U.S. Dept. of Justice, 60 F.3d 1043, 1061 (3d Cir. 1995) (agency's policy of granting express promises of confidentiality on routine basis insufficient); Steinberg v. U.S. Dept. of Justice, 23 F.3d 548, 549 (D.C. Cir. 1994) (stating that Landano requires government to make "more particularized showing" of confidentiality).